



2019

## Fifth Indifference: Clarifying the Fifth Circuit's Intent Standard for Damages Under Title II of the Americans with Disabilities Act

Derek Warden

Louisiana State University and Agricultural and Mechanical College, [derekwarden2@gmail.com](mailto:derekwarden2@gmail.com)

Follow this and additional works at: <https://scholarship.law.tamu.edu/lawreview>



Part of the [Disability Law Commons](#), [Health Law and Policy Commons](#), [Labor and Employment Law Commons](#), and the [Litigation Commons](#)

### Recommended Citation

Derek Warden, *Fifth Indifference: Clarifying the Fifth Circuit's Intent Standard for Damages Under Title II of the Americans with Disabilities Act*, 7 Tex. A&M L. Rev. Arguendo 1 (2019).

Available at: <https://scholarship.law.tamu.edu/lawreview/vol7/iss1/8>

This Arguendo (Online) is brought to you for free and open access by Texas A&M Law Scholarship. It has been accepted for inclusion in Texas A&M Law Review by an authorized editor of Texas A&M Law Scholarship. For more information, please contact [aretteen@law.tamu.edu](mailto:aretteen@law.tamu.edu).

FIFTH INDIFFERENCE: CLARIFYING THE FIFTH CIRCUIT'S INTENT STANDARD FOR DAMAGES UNDER  
TITLE II OF THE AMERICANS WITH DISABILITIES ACT

*Derek Warden\**

*Abstract*

*The Americans with Disabilities Act prohibits discrimination against people with disabilities. Title II of the ADA applies to public entities. That same Title allows plaintiffs to obtain damages upon a showing that the discrimination was intentional. There are generally two possible standards of intent: (1) deliberate indifference or (2) animus. While most Circuit Courts expressly adopted the deliberate indifference model, the Fifth Circuit has not. Indeed, the Fifth Circuit has not adopted any standard and this has led to confusion. The confusion is not helped, moreover, by the sheer lack of justification offered by a number of the Circuit Courts who have adopted either standard. This Essay seeks to clear that confusion. It offers reasons why deliberate indifference, and not the animus standard, should apply to ADA Title II claims. Further, it explains why no Fifth Circuit precedent should be construed as prohibiting the adoption of the deliberate indifference standard.*

---

\* Attorney, Burns Charest LLP in New Orleans. L.L.M. Candidate Tulane University 2020 J.D. & D.C.L. LSU Paul M. Hebert Law Center 2016. B.A. Political Science Louisiana Tech University 2013. Throughout my legal education and career, I have served with numerous firms and public service entities including: The Advocacy Center of Louisiana, Southeast Louisiana Legal Services, The Bioethics Defense Fund, The National Police Accountability Project, The New Orleans Workers Center for Racial Justice, The Promise of Justice Initiative, and the Public Defender for the Third Judicial District of Louisiana, and the Louisiana First Circuit Court of Appeal. My academic and practice areas include class actions, federal civil procedure, constitutional law, the Americans with Disabilities Act, and civil rights. My first position as a practicing lawyer was with the Advocacy Center as a legal fellow with assistance from AmeriCorps, Equal Justice Works, and the United States Department of Justice. I currently serve on the Board of Directors for the PLEASE Foundation. I previously served on the Board of Directors for the Advocacy Center. During law school, I served as graduate editor to the Journal of Civil Law Studies, published an extensive study on the Roman Civil Law historical underpinnings of the United States Constitution, and served as a research assistant to Professor Margaret Thomas.

## TABLE OF CONTENTS

- I. INTRODUCTION AND BACKGROUND
- II. REASONS WHY DELIBERATE INDIFFERENCE SHOULD APPLY TO DAMAGES ACTION UNDER TITLE II OF THE ADA
  - A. *The Purposes of the ADA Suggest Deliberate Indifference and not Animus should Apply to ADA Title II Damages Claims*
    - a. The Purposes of the ADA Generally
    - b. The Purposes of the ADA in Relation to Section 1983 and the Eighth Amendment
  - B. *The ADA, the Rehabilitation Act, and the Spending Clause*
- III. CLARIFYING THE FIFTH CIRCUIT’S PRECEDENTS
- IV. CONCLUSION

## I. INTRODUCTION AND BACKGROUND

The Americans with Disabilities Act (“ADA”) is the result of decades of advocacy and the ideological grandchild of several federal and state statutes that came before it.<sup>1</sup> The enactment of Section 504 of the Rehabilitation Act of 1973 prohibited disability discrimination by recipients of federal funds;<sup>2</sup> the Individuals with Disabilities Education Act prohibited discrimination in education;<sup>3</sup> and various other federal statutes prohibited certain social ills and provided funds for state agencies to protect people with disabilities.<sup>4</sup>

Nevertheless, all of these laws proved to be inadequate. Supreme Court decisions such as *Pennhurst v. Halderman* gutted federal laws that some had thought would lead to the deinstitutionalization of people with disabilities.<sup>5</sup> Many state and private entities did not receive federal funds and were thus not subject to the Rehabilitation Act.<sup>6</sup> Moreover, various constitutional theories failed to protect those with disabilities, due to the sheer lack of equal protection afforded to such people by the Court’s interpretation of the Constitution.<sup>7</sup> It was clear that something more was needed. A law was needed that could apply even where entities did not receive federal funds. It needed to apply to all aspects of life, in education, in employment, and in transportation. Thus, Congress sought to answer the question of what sort of legislation could address all of these needs. The result of this inquiry is what we now call the Americans with Disabilities Act. With the triumphal declaration, “Let the shameful wall of exclusion come tumbling down,” President George H.W. Bush signed this new act into law.<sup>8</sup>

---

<sup>1</sup> See generally Lawrence O. Gostin, *The Americans with Disabilities Act at 25: The Highest Expression of American Values*, 313 JAMA 2231, 2231–35 (2015).

<sup>2</sup> 29 U.S.C. § 794 (2016).

<sup>3</sup> 20 U.S.C. §§ 1400–1482 (2010).

<sup>4</sup> See Kelsey McCowan Heilman, *The Rights of Others: Protection and Advocacy Organizations’ Associational Standing to Sue*, 157 U. PA. L. REV. 237, 241 (2008) (discussing history of the Protection and Advocacy Systems).

<sup>5</sup> *Pennhurst v. Halderman*, 451 U.S. 1 (1981).

<sup>6</sup> As would be needed for the Rehabilitation Act to apply to a particular entity. See 29 U.S.C. § 794.

<sup>7</sup> Michael Waterstone, *Backlash, Courts, and Disability Rights*, 95 B.U. L. REV. 833, 841–42 (2015).

<sup>8</sup> Brian East, *Struggling to Fulfil Its Promise: The ADA at 15*, 68 TEX. B.J. 614 (2005).

The statute is divided into five titles.<sup>9</sup> For our purposes, Title II is the most important. Title II of the ADA concerns government entities.<sup>10</sup> It applies to states,<sup>11</sup> counties,<sup>12</sup> and cities,<sup>13</sup> and to the various arms of those entities.<sup>14</sup> The operative provision of the law states, “Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”<sup>15</sup>

While there may be some highly theoretical differences among the Circuit Courts as to the scope of Title II of the ADA,<sup>16</sup> most courts have come to a standard prima facie case for discrimination.<sup>17</sup> First, the plaintiff must have a disability as defined under law.<sup>18</sup> Second, the person must be “otherwise qualified” for the service program of activity.<sup>19</sup> Third, the individual must have been discriminated against by a public entity.<sup>20</sup> Finally, the plaintiff must have suffered discrimination “by reason of” his or her disability.<sup>21</sup>

Disabled plaintiffs bringing claims under Title II of the ADA may refer to various theories of discrimination.<sup>22</sup> These include disparate treatment, which concerns treating people with disabilities differently than those without;<sup>23</sup> disparate impact, which concerns a neutral policy that has a discriminatory effect;<sup>24</sup> and failure to make reasonable accommodations.<sup>25</sup> In addition, plaintiffs may bring various other claims<sup>26</sup> that may or may not fit well within any particular theory. These include “*Olmstead v. L.C.* claims” for community placement;<sup>27</sup> methods-of-

---

<sup>9</sup> Derek Warden, *A Worsened Discrimination: How Exacerbation of Disabilities Constitutes Discrimination by Reason of Disability Under Title II of the ADA and §504 of the Rehabilitation Act*, 46 S.U. L. REV. 14, 15 (2018).

<sup>10</sup> *Id.*

<sup>11</sup> 42 U.S.C. 12131(1) (1990).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> 42 U.S.C. § 12132 (1990).

<sup>16</sup> See *Seremeth v. Bd. of Cnty. Comm’rs Frederick Cnty.*, 673 F.3d 333, 338 (4th Cir. 2012).

<sup>17</sup> *Windham v. Harris Cty., Tex.*, 875 F.3d 229, 235 (5th Cir. 2017) (“To make out a prima facie case under Title II, a plaintiff must show ‘(1) that he is a qualified individual within the meaning of the ADA; (2) that he is being excluded from participation in, or being denied benefits of, services, programs, or activities for which the public entity is responsible, or is otherwise being discriminated against by the public entity; and (3) that such exclusion, denial of benefits, or discrimination is by reason of his disability.’”) (quoting *Melton v. Dallas Area Rapid Transit*, 391 F.3d 669, 671–72 (5th Cir. 2004)).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> See Derek Warden, *A Helping Hand: Examining the Relationship Between (1) Title II of the ADA’s Abrogation of Sovereign Immunity Cases and (2) the Doctrine of Qualified Immunity in §1983 and Bivens Cases to Expand and Strengthen Sources of “Clearly Established Law” in Civil Rights Actions*, 29 GEO. MASON U. C.R. L.J. 43, 63 (2018).

<sup>23</sup> *Id.* at 65.

<sup>24</sup> *Id.* at 65–66.

<sup>25</sup> *Id.* at 66.

<sup>26</sup> *Id.* at 67.

<sup>27</sup> *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 598 (1999).

administration claims, which are similar to disparate impact claims but are not the same;<sup>28</sup> architectural-barriers claims;<sup>29</sup> and surcharge claims, among others.<sup>30</sup>

In order to obtain damages under Title II of the ADA, courts agree that plaintiffs must show intent.<sup>31</sup> This intent requires knowledge of underlying facts and the meeting of some standard.<sup>32</sup> This “standard” question is the subject of this Essay. Most courts now say that disabled plaintiffs seeking damages from alleged violators of Title II of the ADA must show that these violators’ intent meets the “deliberate-indifference” standard.<sup>33</sup> The standard is generally defined as (1) knowledge that a federally protected right is substantially likely to be violated, and (2) failure to act despite that knowledge.<sup>34</sup> This standard has its origins in other civil rights arenas.<sup>35</sup> Another potential standard is much more difficult; it is the “animus or ill-will” standard.<sup>36</sup> However, the Fifth Circuit has, on several occasions, avoided expressly adopting any specific standard of intent.<sup>37</sup> Understandably, confusion has resulted from this lack of direction. This Essay attempts to clarify that confusion and argues the Fifth Circuit should expressly adopt the deliberate-indifference standard.

The reasons proposed in this Essay for the adoption of the deliberate-indifference standard may be summarized as follows. First, this standard comports with the intent and purposes of Congress, which enacted the ADA to strengthen prior legislation and to protect disabled persons

---

<sup>28</sup> See 28 C.F.R. § 35.130(b)(3) (2016) (“A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration: (i) [t]hat have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability; (ii) [t]hat have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity’s program with respect to individuals with disabilities; or (iii) [t]hat perpetuate the discrimination of another public entity if both public entities are subject to common administrative control or are agencies of the same State.”). As to the private enforceability of methods-of-administration discrimination, see *Dunn v. Dunn* 318 F.R.D. 652, 664 (M.D. Ala. 2016) (“Indeed, there is another—privately enforceable—ADA regulation which makes clear that policies and practices (or their absence) which result in discrimination against people with disabilities are actionable under the ADA, even if the policies and practices . . . are not themselves required by the statute.”).

<sup>29</sup> This is actually taken up in two separate regulations. One addresses “existing facilities” and the other addresses “new constructions or alterations.” See 28 C.F.R. § 35.150 (2012). See also 28 C.F.R. § 35.151 (2011). There is still another regulation dealing specifically with correctional facilities. See 28 C.F.R. § 35.152 (2010).

<sup>30</sup> See 28 C.F.R. § 35.130(f) (2016) (“A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.”).

<sup>31</sup> *Miraglia v. Bd. of Supervisors of La. State Museum*, 901 F.3d 565, 574 (5th Cir. 2018).

<sup>32</sup> *Id.* at 575 (noting that while some standard is needed, the Court did not need to create one, because there must have been at least actual notice of a violation.).

<sup>33</sup> *S.H. ex rel. Durrell v. Lower Merion Sch. Dist.*, 729 F.3d 248, 262–63 (3rd Cir. 2013) (citing authorities from five other circuits and adopting deliberate indifference as the standard). It should be noted here that even the Third Circuit in *Durrell* admitted that the justifications offered by courts for adopting the deliberate-indifference standard were often lacking. *Id.* at 263. As such, this Essay should be viewed as offering additional support for the position while also summarizing some of the standard arguments. For example, while courts have looked to the purposes of the ADA (*see id.* at 264), none have looked at the relevant implications of ADA’s relationship to U.S.C. section 1983 and to the Eighth Amendment. I craft such an argument below in Section II(A)(b).

<sup>34</sup> *Id.* at 263.

<sup>35</sup> *Warden*, *supra* note 9, at 50 (noting that deliberate indifference largely stems from the Eighth Amendment context).

<sup>36</sup> *Miraglia*, 901 F.3d at 575 (citing *Schultz v. Young Men’s Christian Ass’n of U.S.*, 139 F.3d 286, 291 (1st Cir. 1998)).

<sup>37</sup> The three relevant opinions are: *Miraglia*, 901 F.3d at 575; *Perez v. Doctors Hosp. at Renaissance, Ltd.*, 624 F. App’x 180, 185 (5th Cir. 2015); and *Delano-Pyle v. Victoria Cty.*, 302 F.3d 567, 575 (5th Cir. 2002).

in a “more comprehensive” manner (as discussed below in Subsection A of Section II). Second, the protections given by the ADA clearly exceed those given to disabled prisoners suing for damages under section 1983 of the United States Code for violations of their Eighth Amendment rights; such plaintiffs need not show more than deliberate indifference (as also discussed below in Subsection A of Section II). Third, the ADA was meant to strengthen the protections afforded to disabled persons in the Rehabilitation Act, which, because of its constitutional basis in the Spending Clause, requires disabled plaintiffs to show that defendants have a certain degree of knowledge—best classified as deliberate indifference (as discussed below in Subsection B of Section II). Finally, the precedents of the Fifth Circuit do not preclude the deliberate-indifference standard, and one Fifth Circuit case implicitly supports it (as explained below in Section III).

In other words, the protections for disabled persons afforded by Title II of the ADA, understood in light of its relationship with other statutes and with the Constitution, demand that disabled plaintiffs suing for damages be required to show only deliberate indifference. The precedents of the Fifth Circuit do not oppose this standard and arguably support its recognition. The Fifth Circuit should therefore expressly adopt the deliberate-indifference standard.

## II. REASONS WHY DELIBERATE INDIFFERENCE SHOULD APPLY TO DAMAGES ACTION UNDER TITLE II OF THE ADA

### A. *The Purposes of the ADA Suggest Deliberate Indifference and not Animus should Apply to ADA Title II Damages Claims*

#### a. The Purposes of the ADA Generally

In the initial portions of the Americans with Disabilities Act, Congress identified numerous social ills suffered by people with disabilities,<sup>38</sup> and further identified various purposes for the enactment of the statute. Some of the relevant provisions are:

[I]ndividuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;<sup>39</sup>

[Congress seeks to] provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;<sup>40</sup>

[Congress seeks to] provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;<sup>41</sup>

---

<sup>38</sup> See 42 U.S.C. § 12101 (2012).

<sup>39</sup> 42 U.S.C. § 12101(a)(5).

<sup>40</sup> 42 U.S.C. § 12101(b)(1).

<sup>41</sup> 42 U.S.C. § 12101(b)(2).

These provisions necessarily mean that Congress was concerned with issues that do not constitute standard discrimination. Consistent with these provisions, courts have universally declared that the ADA was meant to strengthen earlier efforts to protect people with disabilities,<sup>42</sup> and that Congress had a “more comprehensive” view of what constitutes discrimination than it had when enacting those prior statutes.<sup>43</sup> Further still, courts have explicitly noted that both the Rehabilitation Act and the ADA were intended to extend beyond sheer animus.<sup>44</sup> Put another way, courts have recognized that “[d]iscrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect.”<sup>45</sup> With these purposes and statements in mind, there can be little doubt that a deliberate-indifference standard would be far more faithful to the ADA than an “animus or ill-will” standard.<sup>46</sup>

As such, the general purposes of the ADA strongly suggest that *at most* deliberate indifference should apply to Title II damages actions.

#### b. The Purposes of the ADA in Relation to Section 1983 and the Eighth Amendment

When people think of civil rights litigation, they often think of the preeminent civil rights statute: 42 U.S.C. section 1983.<sup>47</sup> That statute allows plaintiffs to sue government actors or entities (depending on the circumstances) for violations of federally protected constitutional or statutory rights.<sup>48</sup> Section 1983, as it is often called, does not validly abrogate state sovereign immunity.<sup>49</sup> Thus, plaintiffs cannot use it to sue states directly.<sup>50</sup> Moreover, when plaintiffs use it to sue government actors in their individual capacities, they face a host of other immunities and defenses.<sup>51</sup>

---

<sup>42</sup> See *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 599 (1999) (“[T]he ADA stepped up earlier measures to secure opportunities for people with developmental disabilities to enjoy the benefits of community living.”).

<sup>43</sup> *Id.* at 598 (“We are satisfied that Congress had a more comprehensive view of the concept of discrimination advanced in the ADA.”).

<sup>44</sup> *Alexander v. Choate*, 469 U.S. 287, 295 (1985); see also *Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 944–45 (9th Cir. 2011) (citing *Choate’s* discussion of the enactment of the RA to the ADA).

<sup>45</sup> *Choate*, 469 U.S. at 295.

<sup>46</sup> This was part of the reasoning used by the Third Circuit in *S.H. ex rel. Durrell v. Lower Merion Sch. Dist.*, 729 F.3d 248, 264 (3d Cir. 2013).

<sup>47</sup> See Derek Warden, *The Ninth Cause: Using the Ninth Amendment as a Cause of Action to Cure Incongruities in Current Civil Rights Litigation*, 64 WAYNE L. REV. 403, 410 (2019).

<sup>48</sup> The full text of section 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. 42 U.S.C. § 1983 (2012).

<sup>49</sup> Warden, *supra* note 47, at 416.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 406.

The ADA, on the other hand, is largely an exception to the problems faced by section 1983 plaintiffs.<sup>52</sup> Namely, in most situations, sovereign immunity does not apply to Title II of the ADA.<sup>53</sup> Qualified immunity likewise does not apply to ADA claims, because there are no “individual capacity” actions under the ADA.<sup>54</sup> Finally, plaintiffs cannot use section 1983 to enforce the ADA, because the ADA is said to have its own enforcement mechanism such that Congress precluded resort to section 1983.<sup>55</sup>

Nevertheless, there is an odd intersection between the ADA and section 1983. That intersection is the Eighth Amendment. Disability-rights plaintiffs largely abandoned constitutional arguments.<sup>56</sup> There is one major exception to this abandonment—prisons. People with disabilities in prisons were long able to resort to the protections of the Eighth Amendment to largely the same degree as their counterparts without disabilities.<sup>57</sup> This is so because prison healthcare and conditions cases often involved high risks of injury, and such risks were possible for people with disabilities just as they were for people without such conditions. Indeed, due to the nature of several disabilities, it appears that the Eighth Amendment may have placed special protections on those with disabling conditions.<sup>58</sup> Furthermore, both section 1983 and the ADA enforce the Eighth Amendment. Section 1983 allows plaintiffs to sue for violations of the Eighth Amendment.<sup>59</sup> Title II of the ADA is said to be, at times, enforcement legislation under the Fourteenth Amendment—specifically this has been said in the context of the ADA enforcing Eighth Amendment rights.<sup>60</sup>

Importantly, the standard for bringing an Eighth Amendment conditions-of-confinement claim for damages under section 1983 is *deliberate indifference*.<sup>61</sup> Recognizing (1) that section 1983 claims under the Eighth Amendment were one of the rare areas of law where people with disabilities succeeded, and (2) that the ADA was designed to step up prior laws protecting people with disabilities,<sup>62</sup> it would seem absurd to say that the ADA requires a standard less favorable to disabled plaintiffs than the standard used in Eighth Amendment damages cases.<sup>63</sup> As such, the ADA and its relationship to the Eighth Amendment strongly suggest that *at most* deliberate indifference should apply to damages actions under Title II.

---

<sup>52</sup> Warden, *supra* note 22, at 47–63.

<sup>53</sup> *Id.* at 45.

<sup>54</sup> *Id.* at 45.

<sup>55</sup> *Id.* at 49.

<sup>56</sup> Waterstone, *supra* note 7, at 841–42.

<sup>57</sup> Warden, *supra* note 9, at 50 (noting that the worsening of disabilities is usually considered under the Eighth Amendment) (citing *Estelle v. Gamble*, 429 U.S. 97, 104–05 (1976)).

<sup>58</sup> *Id.* at 48 (noting that many courts hold that prolonged solitary confinement of those with mental illness violates the Eighth Amendment).

<sup>59</sup> See Warden, *supra* note 47, at 405–06.

<sup>60</sup> *U.S. v. Georgia*, 546 U.S. 151, 157–59 (2006).

<sup>61</sup> See *Peralta v. Dillard*, 744 F.3d 1076, 1083 (9th Cir. 2014) (noting that section 1983 authorizes suits for money damages for violations of the Eighth Amendment); *id.* at 1081 (noting that the standard for Eighth Amendment claims is deliberate indifference).

<sup>62</sup> *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 598–99 (1999); see also *Tennessee v. Lane*, 541 U.S. 509, 526 (2004) (recognizing that constitutional violations and other civil rights violations had continued prior to the ADA despite other legislative efforts).

<sup>63</sup> To be clear, it is universally agreed that no intent needs to be proven in order for an ADA plaintiff to obtain injunctive or declaratory relief. Warden, *supra* note 22, at 65 (“Under the ADA, a plaintiff need not prove intentional discriminations unless he or she is seeking damages.”).



*B. The ADA, the Rehabilitation Act, and the Spending Clause*

Section 504 of the Rehabilitation Act is a precursor to Title II of the ADA. As such, the two statutes are usually construed together because they have the same remedial schemes.<sup>64</sup> Thus, if one could justify the deliberate-indifference standard for claims under section 504 of the Rehabilitation Act, such would also justify the use of the deliberate-indifference standard for Title II of the ADA.

As other authorities have noted, the nature and background to the Rehabilitation Act do, in fact, strongly suggest that the deliberate-indifference standard should apply to that law.<sup>65</sup> This is so because the Rehabilitation Act is neither Commerce Clause legislation nor Fourteenth Amendment legislation. It is Spending Clause legislation.<sup>66</sup>

Spending Clause legislation is often said to be bound up in contract law principles.<sup>67</sup> One such principle often reflected in Spending Clause legislation is the theory of knowledge.<sup>68</sup> In other words, “[j]ust as a valid contract requires offer and acceptance of its terms, ‘[t]he legitimacy of Congress’ power to legislate under the spending power . . . rests on whether the [recipient] voluntarily and knowingly accepts the terms of the ‘contract.’”<sup>69</sup> This knowledge principle in Spending Clause cases has led to the generally accepted principle that money damages (for violations of Spending Clause based laws) are only allowed where the entity is put on notice that it has violated the law.<sup>70</sup>

As stated, this standard requires knowledge and not “animus” or “ill will.” Thus, it would not seem appropriate to require animus under either the Rehabilitation Act or the ADA. However, a standard lower than deliberate indifference would likely not fulfill the knowledge requirement. Moreover, even though an “animus” or “ill-will” standard would fulfill the knowledge requirement, the knowledge requirement must still be measured against the backdrop of the ADA’s history and purposes.<sup>71</sup>

As such, the nature of the ADA’s relationship to the Rehabilitation Act, which is Spending Clause legislation, strongly suggests that *at least* deliberate indifference should be the standard applicable to ADA Title II damages actions. The other points mentioned in this Section—regarding the ADA’s affording of broad protections that exceed those enjoyed by disabled prisoners, who need only show deliberate indifference to obtain damages under section 1983 for violations of the Eighth Amendment—indicate that *at most* deliberate indifference should apply. Thus, the “Goldilocks point” between all these interests, concerns, and historical points is deliberate indifference.

---

<sup>64</sup> *Kemp v. Holder*, 610 F.3d 231, 234 (5th Cir. 2010) (per curiam); *Hainze v. Richards*, 207 F.3d 795, 799 (5th Cir. 2000).

<sup>65</sup> *S.H. ex rel. Durrell v. Lower Merion Sch. Dist.*, 729 F.3d 248, 264–265 (3rd Cir. 2013); *Liese v. Indian River Cnty. Hosp. Dist.*, 701 F.3d 334, 348 (11th Cir. 2012).

<sup>66</sup> U.S. Const. art. I, § 8, cl. 1; *Taylor v. Altoona Area Sch. Dist.*, 513 F. Supp. 2d 540, 556 (W.D. Penn. 2007).

<sup>67</sup> *Barnes v. Gorman*, 536 U.S. 181, 186 (2002).

<sup>68</sup> *See id.*

<sup>69</sup> *Barnes*, 536 U.S. at 186.

<sup>70</sup> *Id.* at 186–87. *See also S.H. ex rel. Durrell v. Lower Merion Sch. Dist.*, 729 F.3d 248, 264–65 (3rd Cir. 2013); *Liese v. Indian River Cnty. Hosp. Dist.*, 701 F.3d 334, 348 (11th Cir. 2012).

<sup>71</sup> This principle was perhaps the strongest reason given by the Eleventh Circuit in *Liese. Liese*, 701 F.3d at 348.

## III. CLARIFYING THE FIFTH CIRCUIT'S PRECEDENTS

This Section considers whether any precedent from the Fifth Circuit necessarily prevents the adoption of a deliberate-indifference standard. As will be shown below, there is no such precedent that could preclude adoption of the standard. At most, there is confusion on the issue.

The confusion as to which standard of intent applies is best exemplified by the Fifth Circuit's recent decision in *Miraglia*.<sup>72</sup> In *Miraglia*, the plaintiff sought entrance to the lower portions of a state-operated museum.<sup>73</sup> This lower level was comprised of shops to create revenue for the museum.<sup>74</sup> On appeal, the question pertinent to this Essay was whether the plaintiff could obtain damages.<sup>75</sup> When considering the issue of intent, the Court noted intent requires that "the defendant at least have actual notice of a violation."<sup>76</sup> However, the Court refused to adopt any specific standard of intent.<sup>77</sup> After noting that the majority of Circuit Courts have adopted the deliberate-indifference standard, the Fifth Circuit understandably defended its nonconformance by (1) citing one Circuit Court's putatively adopting a higher standard less favorable to disabled plaintiffs,<sup>78</sup> and (2) acknowledging its own prior precedent that seemed to suggest a higher standard than deliberate indifference.<sup>79</sup> The Court then returned to the need for the defendant to have actual notice of a violation.<sup>80</sup> According to the Fifth Circuit, there had been no factual findings and no evidence presented that the defendant had actual notice.<sup>81</sup> As such, the Fifth Circuit held that it did not need to address the issue of what standard of intent to apply.<sup>82</sup>

Therefore, the Fifth Circuit's opinion in *Miraglia* exemplifies the confusion as to whether the Fifth Circuit has or should adopt the deliberate indifference standard. It in no way forecloses the adoption of that standard.

Additionally, in *Miraglia*, the Fifth Circuit cited two of its own cases for the proposition that the Circuit may have adopted a standard higher than deliberate indifference.<sup>83</sup> I discuss these in reverse chronological order. First, the *Miraglia* panel cited *Perez v. Doctors Hospital at Renaissance, Ltd.*,<sup>84</sup> for the proposition that it may have declined to adopt the deliberate-indifference standard. However, a brief review of *Perez* shows that the case in no way forecloses the use of deliberate indifference in the Fifth Circuit. That case dealt with a hospital's failure to provide an interpreter for a parent who was deaf.<sup>85</sup> It should be noted here that, unlike *Miraglia* and *Delano-Pyle*, cited below, *Perez*'s analysis of intent rested solely on the Rehabilitation Act.<sup>86</sup>

---

<sup>72</sup> See *Miraglia v. Bd. of Supervisors of La. State Museum*, 901 F.3d 565, 574–76 (5th Cir. 2018).

<sup>73</sup> *Id.* at 570.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 575.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 574–75.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* ("We need not delineate the precise contours in this case. Instead, we can rely on the widely accepted principle that intent requires that the defendant at least have actual notice of a violation.")

<sup>83</sup> *Id.* (first citing *Delano-Pyle v. Victoria Cty.*, 302 F.3d 567, 575 (5th Cir. 2002); and then citing *Perez v. Doctors Hosp. at Renaissance, Ltd.*, 624 F. App'x 180, 186 (5th Cir. 2015)).

<sup>84</sup> *Id.* (citing *Perez*, 624 F. App'x at 186).

<sup>85</sup> *Perez*, 624 F. App'x at 182.

<sup>86</sup> *Id.* at 184–85.

However, as noted above, the two statutes are interpreted together. When the *Perez* Court considered the intent issue, it merely noted:

[W]e did not define what we meant by intent in *Delano-Pyle*. Some circuits have held that deliberate indifference suffices. The parties have not briefed the issue in any depth, and we decline to make new law on the nature of intent at this time. We conclude that on the present record, there is enough to show a dispute of material fact [on this issue of intent].<sup>87</sup>

As such, *Perez* did not foreclose the adoption of a deliberate indifference standard in the Fifth Circuit; it merely stayed away from adopting any standard at the time, because doing so would have been unnecessary. Indeed, the *Perez* panel openly invited district court judges to define “intent.”<sup>88</sup> Therefore, there is only one more Fifth Circuit case left to consider, the second one cited by the panel in *Miraglia*, namely *Delano-Pyle*.<sup>89</sup>

Properly understood, the facts underlaying the Fifth Circuit’s prior case of *Delano-Pyle* actually support the adoption of the deliberate-indifference standard. The *Miraglia* court cited the following statement from *Delano-Pyle*: “There is no ‘deliberate indifference’ standard applicable to public entities for purposes of the ADA or the RA. However, in order to receive compensatory damages for violations of the Acts, a plaintiff must show intentional discrimination.”<sup>90</sup> This statement is ambiguous as to its meaning. It could be read as simply stating the generally accepted principle that ADA plaintiffs need not show deliberate indifference for the ADA generally, but, if seeking damages, must show some form of intent, which could be deliberate indifference. Or, the statement could be read as saying that something more than deliberate indifference is required for ADA Title II damages actions. The opinion offers guidance on this issue. The Court in *Delano-Pyle* added to the above-quoted text by stating that “[t]he facts addressed at trial support the jury’s finding of intentional discrimination.”<sup>91</sup> Therefore, if the facts in *Delano Pyle* are “deliberate-indifference facts” and not facts that could amount to “animus,” then the this would mean that that Court allowed deliberate indifference to succeed.

The facts in *Delano-Pyle* are indeed “deliberate-indifference facts.” The plaintiff asserted Rehabilitation Act and ADA claims against a municipality for failure to offer accommodations during a driving-while-intoxicated investigation after a car accident.<sup>92</sup> The officer knew that the plaintiff had a hearing impairment.<sup>93</sup> The officer yelled at the plaintiff to conduct a sobriety test,

---

<sup>87</sup> *Id.* at 184 (internal citations omitted).

<sup>88</sup> *Id.* at 186 (“On remand, the district court may, if necessary to resolve the case, make the initial effort to define intent under this statutory scheme.”).

<sup>89</sup> *Miraglia v. Bd. of Supervisors of La. State Museum*, 901 F.3d 565, 574 (5th Cir. 2018) (citing *Delano-Pyle v. Victoria Cty.*, 302 F.3d 567, 574 (5th Cir. 2002)).

<sup>90</sup> *Delano-Pyle*, 302 F.3d at 574–75. At this point, it should be noted that the Fifth Circuit cited its prior case *Carter v. Orleans Parish Public Schools* for the proposition that conduct must be intentional. That case specifically stated that, in the Rehabilitation Act context, in order to obtain damages, the conduct must have been “intentional or manifested some discriminatory animus.” *Carter v. Orleans Parish Pub. Sch.*, 725 F. 2d 261, 264 (5th Cir. 1984). The inclusion of the word “or” necessarily means that the Fifth Circuit understood “intentional” to be something difference than animus. As such, *Carter* is also no obstacle to the adoption of a deliberate-indifference standard.

<sup>91</sup> *Delano-Pyle*, 302 F.3d at 575.

<sup>92</sup> *Id.* at 569.

<sup>93</sup> *Id.*

but the plaintiff could not hear him.<sup>94</sup> The officer became agitated because of his noncompliance.<sup>95</sup> During the stop, the officer failed to call for an interpreter; as a result of the plaintiff's inability to properly replicate the sobriety test, he was arrested.<sup>96</sup> Thus, not only was the plaintiff not accommodated, he was arrested for actions arising from his disability.<sup>97</sup> On the other hand, the officer did not set out to humiliate the plaintiff because he had a disability. The officer did not express hatred towards the plaintiff or people with disabilities generally.<sup>98</sup> Indeed, at worst, the officer was annoyed by the plaintiff's inability to comply<sup>99</sup>—but annoyance is neither animus nor malice. Furthermore, the Fifth Circuit in *Delano-Pyle* nowhere mentioned animus or ill will.<sup>100</sup> The officer did, however, know the plaintiff was having trouble communicating and that he had a hearing impairment; still the officer failed to take appropriate action.<sup>101</sup> Therefore, the facts of *Delano Pyle* are much more related to “deliberate-indifference” facts than to “animus or ill-will” facts. As such, the ambiguous statement in *Delano-Pyle* quoted above should be interpreted as follows:

There is no deliberate-indifference standard for ADA claims generally. However, while Title II plaintiffs do not need to show intent for purposes of obtaining equitable relief, they must prove intent in order to seek damages. Intent can be proven by the facts presented in this case. The facts presented in this case are deliberate-indifference facts. As such, ADA Title II damages claims can be proven under the deliberate-indifference standard.

Therefore, nothing in the Fifth Circuit's precedents preclude adoption of the deliberate-indifference standard. Indeed, the facts of *Delano-Pyle* highly suggest that deliberate indifference suffices.

#### IV. CONCLUSION

Title II of the ADA was enacted to increase protections for people with disabilities. These protections were meant to extend beyond conduct resulting from animus or ill will. Therefore, a deliberate-indifference standard would be more faithful to the ADA than an animus standard. Furthermore, deliberate indifference is the standard for Eighth Amendment claims as well; the Eighth Amendment is one of the few areas where disability-rights plaintiffs won in court prior to the adoption of the ADA. As such, it would be nigh absurd to say that the ADA (which was intended to increase civil rights protection for those with disabilities) would require disabled plaintiffs to face a more difficult standard for damages than that required for section-1983 claims for damages based on the Eighth Amendment. These points indicate that animus cannot be the standard for Title II damages actions. Moreover, the ADA and the Rehabilitation Act are interpreted together, especially in the area of remedies. The history of the Rehabilitation Act—its

---

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 575.

<sup>100</sup> For a standard as high as malice, animus, or ill will, one would expect the court to use such language if it were to adopt such a standard.

<sup>101</sup> *Id.* at 570–71, 575.

nature as Spending Clause legislation, which requires knowledge in order for plaintiffs to obtain damages—indicates that a knowledge requirement is also imparted onto Title II claims for damages. A standard lower than deliberate indifference would likely not meet this knowledge requirement. While the Fifth Circuit has refused to expressly adopt an intent standard, its decision in *Delano-Pyle* shows that facts meeting deliberate indifference can meet the heretofore undefined intent standard for ADA Title II damages claims. Lastly, should the Fifth Circuit finally announce its adoption of the deliberate-indifference standard, it would bring itself in union with the great majority of its sister circuits.